



1 FOR PUBLICATION

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7 IN THE SUPERIOR COURT
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9 COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

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ALVIN OWENS,) Civil Action No. 04-0288E

Plaintiff,)

) vs.

BERNADETTE SACCOMANNO, ET)
AL.,)

Defendants.)

ORDER GRANTING DEFENDANT DR. J.
DAVID SOUTHCOTT'S MOTION TO
DISMISS

I. INTRODUCTION

THIS MATTER came for hearing on September 21, 2006 at 1:30 p.m. to hear a Motion to Dismiss on shortened time filed by Defendants. Assistant Attorneys General Dana Emery, Gregory Baka, and David Lochabay, appeared on behalf of Defendants Dr. J. David Southcott, Dr. Bernadette Saccomano, and Commonwealth Health Center (CHC), respectively. Counsel George Hasselback appeared on behalf of Plaintiff Alvin Owens. At the hearing, Plaintiff challenged the Attorney General's certification that Dr. Southcott was acting within the scope of his employment under CHC at the time the events giving rise to the above-captioned action arose.

The Court took Defendant Dr. Southcott's motion to dismiss the complaint against him pursuant to P.L. 15-22 under advisement. The Court then issued an opinion which invited Plaintiff to challenge

DEFENDANT
EXHIBIT

1 the Attorney General's certification and set out the procedural guidelines for initiating such a challenge.
2 In accordance with the procedures laid out in its October 5, 2006 opinion, the Court instructed the
3 parties to submit statements of undisputed and disputed material facts with regard to whether Dr.
4 Southcott was acting within the scope of his employment for CHC at the time the events giving rise to
5 this complaint occurred in order to assess the validity of the Attorney General's certification. Each
6 party submitted self-styled statements of facts and arguments to the Court addressing whether Dr.
7 Southcott was acting within the scope of his employment at the time the events giving rise to this action
8 occurred. The Court called the parties for a status conference on March 12, 2007, and issued a tentative
9 ruling that found Plaintiffs failed to demonstrate that any facts existed which challenged the Attorney
10 General's certification, and that the complaint against Dr. Southcott should be dismissed pursuant to 15-
11 22. The discussion below explains the Court's reasoning behind its March 12, 2006 ruling.

13 II. DISCUSSION

14 This Court has previously found that although Public Law 15-22 does not specifically provide
15 for Judicial Review of Attorney General certifications, the Commonwealth acknowledges that the law is
16 fashioned closely after amended portions of the Federal Tort Claims Act, and therefore, found that
17 certifications by the Attorney General are subject to review by the trial court. *Gutierrez de Martinez v.*
18 *Dirk A. Lamagno*, 515 U.S. 417, 115 S. Ct. 2227, 132 L.Ed.2d 375 (1995). Accordingly, the Court
19 adopted the review procedure employed by federal courts:

20 The Attorney General's certification is subject to de novo review in the trial court. *Green*
21 *v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993); *Meridian Int'l Logistics, Inc. v. United States*, 939
22 F.2d 740, 745 (9th Cir. 1991). The trial court should apply respondeat superior principles
23 of state law when reviewing the certification. *McLachlan v. Bell*, 261 F.3d 908, 911 (9th
24 Cir. 2001); *Wilson v. Drake*, 87 F.3d 1073, 1076 (9th Cir. 1996). The party seeking review
25 of the certification bears the initial burden of proof and must present evidence sufficient to
disprove certification by a preponderance of the evidence. *Green*, 8 F.3d at 698. The
Attorney General's certification is *prima facie* evidence that the employee was acting within
the scope of his employment. *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995).
The trial court is authorized, but not required, to hold a hearing to resolve disputed factual
issues. *Pellitier v. Federal Home Loan Bank*, 968 F.2d 865, 874 (9th Cir. 1992) (citing

1 *Meridian*, 939 F.2d at 745). See also *McLachlan*, 261 F.3d at 910-11. A hearing should not
2 be held where the certification, pleadings, affidavits, and any supporting documentary
3 evidence do not reveal any disputed issues of material fact as to scope of employment.
4 *Gutierrez de Martinez v. Drug Enforcement Administration*, 111 F.3d 1148, 1155 (4th Cir.
5 1997) (*Sub nom Gutierrez de Martinez v. Dirk A. Lamago*, *supra*, in the Supreme Court).
6 Defendant's Memorandum of Law in Support of Motion to Dismiss Defendant J. David Southcott under
7 Public Law 15-22, p. 5.

8 Plaintiff in opposing the Attorney General's certification has relied primarily on a legal
9 argument that Dr. Southcott's certification was defective because Dr. Southcott resembled an
10 independent contractor rather than an employee. In so stating, Plaintiff relies on federal circuit court
11 precedent interpreting the independent contractor exception to Federal Tort Claims Act's (FTCA) waiver
12 of sovereign immunity. However, as stated above and in this Court's previous opinion, PL 15-22 was
13 based on the Federal Employees' Liability Reform and Tort Compensation Act of 1988 [FELRTCA], or
14 the "Westfall Act". Consequently, it appears that the central issue should be confined to whether or not
15 Plaintiff has presented sufficient evidence to rebut the presumption that Dr. Southcott was acting within
16 the scope of his employment based on respondeat superior principles.

17 Notwithstanding this distinction, the Court appreciates the obvious prerequisite that in order for
18 respondeat superior principles to apply, there must be established some kind of master-
19 servant/employer-employee relationship. Therefore, the Court will examine first whether Dr.
20 Southcott's relationship with CHC was that of employee or independent contractor, and then, if Dr.
21 Southcott is deemed an employee, whether Plaintiff has presented sufficient evidence to show that Dr.
22 Southcott's actions fell outside the scope of his employment such that it merits any further hearing on
23 the matter.

24 **A. Dr. Southcott was an Employee of CHC at the Time of the Events Giving Rise to the
25 Current Action**

As argued by Defendants, our Supreme Court has identified several non-exclusive factors which

1 aid in determining whether a person serves in the capacity as a servant (or employee) or an independent
 2 contractor:

- 3 (a) the extent of control which, by the agreement, the master may exercise over the details
 of the work;
- 4 (b) whether or not the one employed is engaged in a distinct occupation or business;
- 5 (c) the kind of occupation, with reference to whether, in the locality, the work is usually
 done under the direction of the employer or by a specialist without a supervision;
- 6 (d) the skill required under the particular occupation;
- 7 (e) whether the employer of the workman supplies the instrumentalities, tools, and the place
 of work for the person doing the work;
- 8 (f) the length of time for which the person is employed;
- 9 (g) the method of payment; whether by time or by the job;
- (h) whether or not the work is part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not a business.

10 *Castro v. Hotel Nikko Saipan, Inc.*, 4 N.M.I. 268, 273 (1995), quoting *Community for Creative Non-*
 11 *violence v. Reid*, 490 U.S. 730, 750-51, n. 31, 109 S.Ct. 2166, 2178-79, 2179 n.31, 104 L.Ed.2d 811,
 12 831-832, 832 n. 31 (1989).

13 Plaintiff, cites federal case law, specific to the interpretation of the FTCA exception to the
 14 federal waiver of sovereign immunity, particularly with respect to whether a medical professional
 15 qualified as an employee or a subcontractor, which mirrors the Supreme Court factors enumerated
 16 above. See *Garcia v. Reed*, 227 F.Supp.2d 1183 (Dist. Ct. NM, 2002), *Duplan v. Harper*, 188 F.3d
 17 1195 (10th Cir.,1999), *Robb v. U.S.*, 80 F.3d 884 (4th Cir., 1996), *Bernie v. U.S.*, 712 F.2d 1271 (8th
 18 Cir., 1983) and *Linkous v. U.S.*,142 F.3d 271 (5th Cir., 1998). These cases list several non-exclusive
 19 factors which weigh on the determination of the relation between the medical professionals and the
 20 government entity hiring them. Consistent among the factors examined in the above-cited cases were
 21 (1) whether the hired party expressly “accepted assignment as an independent contractor” or an
 22 employee; *Garcia*, 227 F.Supp.2d 1183, *Robb*, 80 F.3d 884, *Duplan* 188 F.3d 1195; (2) whether the
 23 hired party was required to provide his/her own liability coverage; *Id*; (3) whether the professional hired
 24 was responsible for providing his/her own equipment; *Id*; (4) whether “ the Government supervises the
 25 day-to-day operations of the individual”, *Id*

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2 In claiming that Dr. Southcott was an independent contractor, Plaintiff relies on the undisputed
3 language of Dr. Southcott's contract that Dr. Southcott was exempted from the Fair Labor Standards Act
4 of 1936; that Dr. Sothcott was hired for a short period of time (30 days); that Dr. Southcott was hired to
5 cover a specific shortfall in doctors; that Dr. Southcott failed to acquire annual or sick leave during the
6 term of his contract; that Dr. Southcott was not entitled to administrative leave with pay; that Dr.
7 Southcott was a highly skilled and educated individual; that Dr. Southcott was performing a highly
8 skilled and specialized task as radiologist. Notwithstanding Plaintiff's accurate assertions made *supra*,
9 Plaintiff has failed to persuasively demonstrate that Dr. Southcott was an independent contractor rather
10 than an employee of CHC.

11 First, the actual contract giving rise to Dr. Southcott's employment relationship with CHC
12 *expressly* labels Dr. Southcott as an employee and CHC as Dr. Southcott's employer and the Court, in
13 presuming that the contract, as written, expresses the intent of the parties, must give it proper effect. As
14 cited above, the federal courts have given substantial weight to the characterization of an employment
15 relationship by the express terms of the contract giving rise to the relationship. *See Garcia*, 227
16 F.Supp.2d 1183, Robb, 80 F.3d 884, Duplan 188 F.3d 1195. In addition, though, the term of
17 employment specified in Dr. Southcott's Excepted Service Employment Contract is short, it is
18 nevertheless distinguishable from a contract hiring an independent contractor because it compensated
19 Dr. Southcott on the basis of an annual salary rather than a payment per services agreement. The Court
20 therefore accords little weight to the agreed length of the employment for the purposes of distinguishing
21 an employment contract from a contract for hiring an independent contract.

22 Secondly, although the employment contract failed to provide Dr. Southcott of some benefits
23 typically provided for certain Commonwealth employees, e.g. coverage under FLSA, annual leave, sick
24 leave, and administrative leave, such omissions are not so unique as to conclusively indicate that Dr.
25 Southcott was not retained as an employee. Moreover, Dr. Southcott was entitled to benefits typically

1 granted to CNMI employees such as worker's compensation coverage, and the availability of CNMI
2 Group Health and Life Insurance coverage. As argued by Defendants, Dr. Southcott under his
3 Excepted Service Employment Contract was covered by the now-repealed PELDIA, and thus was not
4 required to obtain malpractice coverage through MDA.

5 Thirdly, though Plaintiff plainly states that Dr. Southcott is a highly skilled and educated
6 individual who was hired to perform highly skilled and specialized tasks as a radiologist, Plaintiff offers
7 no evidence that CHC did not exercise supervisory authority over Dr. Southcott's performance of his
8 daily operations. Because it is the burden of the party challenging the Attorney General's certification
9 to demonstrate a disputed issue of fact in order to warrant further hearing, Plaintiff's mere statement that
10 Dr. Southcott was highly skilled and qualified, and that Dr. Southcott was employed to perform highly
11 skilled tasks is insufficient to create an issue of whether CHC had supervisory authority over Dr.
12 Southcott's performance of his duties.

13 In short, Plaintiff has failed to demonstrate by a preponderance of the evidence that Dr.
14 Southcott's actual relationship with CHC controverted the express language of his Excepted Service
15 Employment Contract, which expressed the intent and the belief of the parties that they entered into an
16 employment agreement and a master-servant relationship. While the Court is not unsympathetic to
17 Plaintiff's frustration over the difficulties of proving such in light of its inability to discover additional
18 evidence to contradict the express nature of Dr. Southcott's agreement, it is unable to identify any well-
19 grounded legal argument which mandate any further hearing on the matter. Consequently, the Court
20 will move on to the question of whether Plaintiff has proven by a preponderance of the evidence that Dr.
21 Southcott acted outside the scope of his employment at the time the events giving rise to this action
22 occurred.

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3 **B. Plaintiff Has Failed to Rebut the Presumption that Dr. Southcott was Acting Within the**
4 **Scope of His Employment by a Preponderance of the Evidence**

5 Consistent with this Court's adopted procedural framework for contesting an Attorney General's
6 certification that an employee was acting within the scope of his/her employment, the Court will apply
7 the principles of respondeat superior to determine whether such certification was in error. *McLachlan*
8 v. *Bell*, 261 F.3d 908, 911 (9th Cir. 2001). Specifically, *McLachlan*, distills the determination of
9 whether an employee acted within the scope of employment to whether the actions of the employee
10 were *foreseeable* in light of his/her employment, and has interpreted such "broadly":

11 Foreseeability suffices for conduct to be within the scope if it "is not so unusual or startling
12 that it would seem unfair to include the loss resulting from it among other costs of the
13 employer's business." No "nice inquiry" is made as to whether the employee was engaged
14 in the ultimate object of his employment where he combines his personal business with his
15 employer's, unless it is clear that "neither directly nor indirectly could he have been serving
16 his employer." Even "willful and malicious torts of an employee" can be within the scope
of his employment, and that may be so even where the employee's torts violate the
employer's express rules and confer no benefit on the employer. Thus, for example, torts
have been found to be within the scope of employment where an employed truck driver beat
a motorist with a wrench, a traveling salesman beat a motorist with whom he had a near-
accident, and a contractor's employee threw a hammer at a subcontractor. . . .

17 . . .

18 Under the broad California doctrine, the conduct of all three defendants was within the scope
19 of their employment. All three acted foreseeably, in the sense that their conduct was "not so
20 unusual or startling that it would seem unfair to include the loss resulting from it among
21 other costs of the employer's business." There is unfortunately nothing "unusual or startling"
about personal hostility, backbiting, resentment of another's success, false rumors, and
malicious gossip in the workplace.

22 *Id* (citations omitted).

23 Here, Plaintiff has failed to present any evidence suggesting that Dr. Southcott's conduct was so
24 "unusual or startling" that it would be unforeseeable to an employer. Plaintiff alleges in his complaint
25 that Dr. Southcott was negligent in diagnosing Plaintiff's x-rays. Dr. Southcott's alleged actions or

1 omissions which give rise to Plaintiff's claims are foreseeable in the scope of his employment as he was
2 hired as a radiologist in order to, among other things, examine and analyze the x-rays of patients. It is
3 therefore, not unusual or startling that mistakes in analysis and diagnosis would occur as a doctor is
4 acting within the scope of his/her employment.

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6 **C. Absent a Valid Challenge to the Attorney General's Certification, the Court is**
7 **Compelled to Dismiss Dr. Southcott from Plaintiff's Complaint Pursuant to PL 15-22**

8 Defendant's Motion to Dismiss is grounded in Com. R. Civ. 12(b)(6), which allows for the
9 dismissal of claims for which the recognized law provides no relief. A motion to dismiss is therefore
10 solely aimed at attacking the pleadings.

11 Since Com. R. Civ. P. 8 requires only a "short and plain statement of the claim showing that the
12 pleader is entitled to relief," there is "a powerful presumption against rejecting pleadings for failure to
13 state a claim." *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 386 (5th Cir. 1985). Consequently, a
14 motion to dismiss for failure to state a claim upon which relief can be granted will succeed only if from
15 the complaint it appears beyond doubt that plaintiffs can prove *no* set of facts in support of their claim
16 that would entitle them to relief. *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999) (*emphasis*
17 *added*).

18 The burden is upon the movants to establish beyond doubt that the Plaintiff's action is
19 one upon which the law recognizes no relief. . All allegations of material fact are taken as true and
20 construed in the light most favorable to the non-moving party. The Court in examining the pleadings
21 will assume all *well-plead* facts are true and draw reasonable inferences to determine whether they
22 support a legitimate cause of action. See *Cepeda v. Hefner*, 3 N.M.I. 121, 127-78 (1992); *In re*
23 *Adoption of Magofna*, 1 N.M.I. 449, 454 (1990); *Enesco Corp. v. Price/Costco, Inc.*, 146 F.3d 1083,
24 1085 (9th Cir. 1998). In reviewing the sufficiency of the complaint, the "issue is not whether a plaintiff
25 will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."
Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974). "[I]t may appear on the face of the

1 pleadings that recovery is very remote and unlikely but that is not the test." *Id.*

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3 Public Law 15-22 repeals the Public Employee Legal Defense and Indemnification Act
4 (PELDIA) codified as 7 CMC §§ 2301-07 in its entirety. Public Law 15-22 also mandates the dismissal
5 of Commonwealth employees from negligence lawsuits upon certification by the Attorney General to
6 the Court that the Commonwealth Employees were acting within the scope of their employment when
7 the acts or omissions complained of in the lawsuit occurred. After certification and dismissal, the CNMI
8 is substituted as Defendant, if not already named, in the employee's place.

9 Here, Plaintiff's complaint alleges ordinary negligence against all Defendants. Dr. Southcott has
10 provided certification from the Attorney General he was acting within the scope of his employment as a
11 physician at CHC at the time of the incident giving rise to the claims of Plaintiffs in this action. Plaintiff
12 failed to adequately contest the validity of such certification and the Court finds no patent reason to
13 question its validity. Consequently, in accordance with the law set forth in PL 15-22, Dr. Southcott's
14 request for dismissal from Plaintiff's negligence cause of action is **GRANTED**.

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II. CONCLUSION

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For the foregoing reasons, Defendant Dr. J. David Southcott's Motion to Dismiss is **GRANTED**.

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20 **SO ORDERED this 21st day of March, 2007.**

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/s/

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David A. Wiseman, Associate Judge

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